Exploring Perspectives of the Unified Patent Court and Unitary Patent Within the Business and Legal Communities

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Objectives

- ***The main objectives of the study:***

- – Identify the key issues of concern to the business and legal sectors with regards to the Unified Patent Court and the Unitary Patent.

- – Assess and appraise which issues are of greater or lesser relative importance to stakeholders.

- – Gauge the overall sentiment of the aforementioned stakeholders with respect to the introduction of the Unified Patent Court and the Unitary Patent, including the likelihood that they will engage with the new system.

Methodology

- ***The study methodology involved:***

- – A review of existing literature on the current state of patent litigation in Europe and the UPC/UP reforms.
- – In-depth interviews with key stakeholders within the business and legal sectors – 26 interviews took place
- – Analysis and synthesis of the findings from the interviews, and the provision of recommendations based on the observations.

Judicial quality

- ***The issues of judicial composition and quality will be crucial to the success of the UPC.***

- Potential users of the UPC have real concerns regarding bifurcation and the granting of injunctions (especially in the ICT sector) and the central revocation risk (particularly evident in the Pharmaceutical sector).
- There is also anxiety amongst stakeholders concerning patent troll litigation and forum shopping at the UPC.
- In this respect, companies in all sectors have concerns about the maintenance of common standards across the 25 MS of the UPC.
- It is imperative that a high-quality judiciary is established across the entire UPC system, as this will do much to alleviate these concerns. To achieve this, effective training must be provided for the judiciary and clear UPC Rules of Procedure must be defined and published as soon as possible.

Costs

- ***Cost is a real issue of concern for potential users of the UPC and UP.***

- There is hope that the UPC will lead to lower overall costs for patent litigation in Europe; however, this is tempered by the fact that many potential users fear that the costs of patent litigation in Europe will in fact increase.
- There are also concerns over the value-based fee system, including its perceived unpredictability.
- Many businesses report that the wide protection offered by the UP may not be worth paying for, although it will be seen positively if fees are set at a reasonable level.
- A UP renewal fee which is
- set far above the combined UK, French and German renewal fees is likely to reduce the attractiveness of the UP as an option for those who currently take out limited European protection (ICT and ENG).

Portfolio Management

- ***Whether to opt-in or opt-out of the UPC jurisdiction is an important decision for patentees, and many are as yet undecided about what they intend to do***.

- The responses strongly suggest that the opt-out fee will be a major factor in this decision and several interviewees argued that it should be set at an administrative level.
- The data suggest that many patentees will initially seek to opt out their most valuable patents, while keeping low and mid-range patents within the UPC system, though some patentees may opt-in their 'strongest' patents to benefit from one-stop enforcement.

Legal aspects

- ***The London-based Central Division is expected to be beneficial for both for the legal community in London and for Pharmaceuticals more generally.***

- The legal profession faces a number of important challenges over the coming years as a result of the new system.
- The emerging view is that larger firms will benefit over smaller firms due to the amount of resources required to conduct speedy patent trials.
- Patent attorneys expect there to be an increase in costs for their firms.
- The use of English at the UPC is seen as a benefit for UK firms.

SMEs

- ***The key concerns relating to SMEs are cost, the revocation risk, and the injunction risk.***

- SMEs share many of the primary concerns of the larger companies regarding the UPC.
- However, the major difference for SMEs is the scale of the risk involved. A revocation ruling, or an injunction grant, against an SME with effect across 25 MS could prove fatal to the SME's prospects.

Looking Forward

- ***Overall, potential users of the UPC and UP possess both hope for, and concerns over, the new system.***

- Concerns such as higher costs, greater complexity and more patent troll litigation are countered by the potential benefits of lower costs and one-stop enforcement. However, it is clear from the interviews that these hopes, expectations and fears are not set in stone; they are contingent on a number of yet to be decided issues, such as what the exact rules of procedure will be and what the precise levels of the fees for the UPC and UP will amount to.
- As such, the planners/organisers of the UPC and UP ought to take into account the views of the stakeholders canvassed here in order to harness the real, yet fragile, goodwill that exists towards the UPC, while at the same time allaying the major fears about it in the minds of the system's potential users.

Remaining questions

- How will an opted-out patent be perceived by competitors? As weak?
- What about other IP rights in the portfolio? At present a HC case can involved more than just patent rights e.g. Designs, Trade Marks etc.
- The UPC will only hear patent actions – disadvantage?